

STATE OF OKLAHOMA,)
)
 Plaintiff,)
)
v.) **Case No. 05-cv-329-GKF(SAJ)**
)
TYSON FOODS, INC., et al.,)
)
 Defendants.)

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA (the “State”), respectfully moves this Court for an order striking “Defendants’ Motion to Compel Production of Plaintiffs’ [sic] Working Models and Integrated Brief in Support” [DKT # 1721] on the ground that Defendants failed to meet and confer as required by the Rules.¹ Had they met and conferred with the State, Defendants would have discovered that a motion to compel was completely unnecessary and unwarranted.

In fact, Defendants filed their Motion to Compel at the very same time that they were talking with the State about the very same issues that are the subject of this

¹ Pursuant to LR 7.2(k), Counsel for the State contacted the attorney who filed the motion on behalf of Defendants to confer regarding whether Defendants object to the relief sought by the State's Motion to Strike. The State was met with further requests for information and told that upon responding, Defendants would *consider* withdrawing their Motion to Compel. *See* Exhibit C. Counsel for the State responded to Defendants' questions the following business day. *See* Exhibit D. From this exchange, it is clear that the conferral process is ongoing, and Defendants' motion should be stricken.

unnecessary motion to compel. Meanwhile, the State was in the process of gathering the information Defendants asked for and drafting a detailed supplemental response. *See, e.g.*, correspondence between Michael Bond and David Page (attached as Exhibit A). In addition to this written correspondence, on Tuesday, June 10th, Mr. Page again assured Defendants' counsel that supplemental information was forthcoming. Mr. Page explained that this information would show Defendants' counsel and their modeling expert that the requested files *had already been produced* and could be used to run the water quality models used by Plaintiff's experts – Drs. Engel and Wells. But instead of waiting on Mr. Page, Defendants' ran to the Court on June 12 and filed this motion to compel asking for the same information that Mr. Page was in the process of talking with them about.

Rule 37(a)(1) of the Federal Rules of Civil Procedure provides that: “[t]he motion [to compel] must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.” Additionally, LCvR 37.1 provides that: “this Court shall refuse to hear any [discovery dispute] motion or objection unless counsel for movant first advises the Court in writing that counsel personally have met and conferred in good faith and, after a sincere attempt to resolve differences, have been unable to reach accord” (emphasis added). And again, Rule 37(a)(5)(A) of the Federal Rules of Civil Procedure provides that when discovery is produced after a motion to compel is filed: “. . . the court must not order th[e] payment [of attorney fees] if: (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action . . .” (Emphasis added.) Obviously, Defendants here failed to meet these

conference requirements. As such, these Rules require denial of the Motion to Compel and the request for fees.

As explained above, and shown by the attachments, Defendants filed their Motion to Compel after counsel for the State orally and by email confirmed that the State would provide a supplemental response to Defendants. Defendants did not certify that they met and conferred because they could not. Discussions on how to resolve their concerns were—and are—ongoing. On June 13, 2008, as promised to Defense Counsel before the filing of their Motion to Compel, the State supplemented its disclosure to fully explain what had been produced and the format and organization in which the files had been produced so that the State’s modeling files could be easily understood by Defendants’ experts. See Correspondence from D. Page to Michael Bond dated June 13, 2008 (attached as Exhibit B). To date, the parties have not reached an impasse with regard to production of these materials as contemplated by the Rules. See, e.g., *Burton v. R.J. Reynolds Tobacco Co.*, 203 F.R.D. 624, 625 (D. Kan. 2001) (overruling motion to compel, in part, because moving attorney failed to meet and confer); *Western Aerospace Corp. v. Glowczyk*, 2006 WL 3792658, *1 (W.D. Wash., Dec. 20, 2006) (denying sanctions and admonishing movant for failure to comply with meet and confer requirements); *In re Presto*, 358 B.R. 290, 293 (Bkrtcy. S.D. Tex. 2006) (“It is vitally important that counsel confer with one another in good faith, and so represent to the Court, before taking up court time.”); *In re Lentek International, Inc.*, 2006 WL 2986997, *2 (Bkrtcy. M.D. Fla., Sept. 12, 2006) (“Courts should not get involved in discovery disputes until the parties have conferred and reached an impasse.”). Rather, Defendants are strategically using an unripe issue in an attempt to bolster their argument that they

should be entitled to an extension of time to meet their expert deadlines, which was filed on the same day as Defendants' Motion to Compel. The suggestion that the State has caused the need for Defendants' experts to receive an extension is not based in reality—it is manufactured pretense and transparent posturing.

When a party is in good faith complying with its discovery obligations, it should be able to do so without the fear of being blindsided by a motion to compel and for sanctions. Such a motion and request for relief is wholly inappropriate in any case when the party has not had the opportunity to resolve the issues without court intervention and especially, as in the instant case, where the State has represented to Defendants that it would supplement its disclosure. *See, e.g., Payless Shoesource Worldwide, Inc. v. Target Corp.*, 237 F.R.D. 666, 670–71 (D. Kan. 2006) (denying motion to compel for failure to provide certification of good faith efforts as well as for failure to confer reasonably and in good faith where four-page letter regarding deficiencies was mailed merely four days prior to filing motion to compel).

For the reasons set forth above, the State respectfully requests that the Court strike Defendants' Motion to Compel in its entirety or alternatively, strike Defendants' request for fees and costs and allow the State time to prepare a response.

Respectfully Submitted,

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Subject: FW: Tyson RFP Concerning Modeling Documents

Michael, per my email to you last Thursday, we will be responding to your RFP by supplement this week, but, again, the information you requested has been produced as considered materials as far as I can tell from my discussions with Dr Wells and Dr Engel. As I said in my email last Thursday, we will send you this week a supplemental response this week that will ID the Request with the relevant document(s) that are responsive. David.

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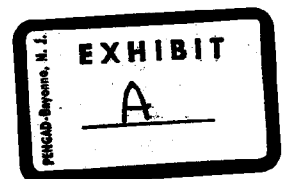
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Subject: Tyson RFP Concerning Modeling Documents

Pursuant to our call yesterday, I can confirm that all of the "documents" responsive to the above referenced request for production (RFP) concerning the modeling information should be included in the "considered materials" produced with Dr Engel's and Dr Wells' expert reports. In order to hopefully avoid any confusion as to which of the considered documents are responsive to each individual request, next week, I will prepare a supplemental response to these requests that will include a separate production, (that we believe is a duplicate of the items produced in the considered materials) on discs or DVDs that will separately identify and include (by file name on the disc and by RFP number) the requested documents that the State or its experts (Engel and Wells) have that are responsive to each of your RFPs.

Please call if you have any questions.

Thanks, David.

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June 13, 2008

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Re: Tyson Request for Production of Documents Concerning Modeling Documents

Dear Michael:

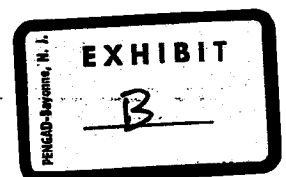
This letter is written pursuant to our recent emails and telephone calls and in particular in response to the email you sent on May 30, 2008 (see attached). Based on our discussions, I understand that you wanted supplemental responses to Defendant Tyson Foods, Inc.'s April 17, 2008 Requests for Production to Plaintiff's ("Model RFPs") and that you wanted these supplemental responses to identify responsive documents by each separate request for the water quality models used by Drs. Engel and Wells. As noted below, these materials were produced as part of their considered materials along with their expert reports. The models were not disaggregated – all model runs were produced as kept in their respective directory/folder as they were stored on the expert's computers so that any experienced WQ Modeler should be able to run them as they were used by the experts.

The following should answer your questions regarding the Model RFPs and your May 30th email.

Request for Production No. 1: Please produce all Models relating to the IRW created in connection with this matter and/or which you intend to rely upon in this matter.

Supplemental Response to Request No. 1:

Dr. Engel's Models: Dr. Engel used two (2) models. The LOADEST Model and Model documentation was provided in his expert considered materials under the



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file folder named "y:\Engel\Materials\il_river_note\loadest\LOADEST\folder". The GLEAMS model and model documentation was provided in his expert considered materials in the folder "y:\engel\Materials\GLEAMS\Model\Source Code\folder". The GLEAMS executables are also in each of the scenario sub watershed folders described in the Supplemental Response to Request No. 2 (below). The routing equations are described in Appendix D to Dr. Engel's Expert Report at pp D-20 – D-22.

Dr. Well's Model: The model used by Dr. Wells is the CE-QUAL-W2 which can be downloaded from <http://www.cee.pdx.edu/w2>. This was mentioned on p. 5 of Dr. Wells, Expert Report.

All of the files used by Dr. Wells in the model set-up, calibration and scenario runs were provided as part of Dr. Wells considered materials. The files used for modeling were from 3 different computers each of which were doing similar processing tasks. Hence, there may be some duplication among the files. The model includes the model executable, the model source code, all input files, all output files, and all processing programs/codes/procedures used for the input and output from the model.

The specific file names that are responsive to Request No. 1 are: "50yr.zip", "50yrmoratorium.zip", "50yrmoratoriumsod=0.1-0046.zip", "50yrmoratoriumsoddecline0046.zip", "50yrmatural.zip", "97-06 Data.zip", "98-07 Data.zip", "Model_calibration.zip", "model-calib-updates.zip", "Source code.zip", and "W2 Model-updates.zip"

Request for Production No. 2: Please produce all input files used in the Models.

Supplemental Response to Request No. 2:

Dr. Engel's Models:

For the GLEAMS Model the "y:\Engel\Materials\GLEAMS_Final\" folder contains a series of folders (see list below) for model scenarios described in the Dr. Engel's Expert Report. Each scenario folder contains a folder for each of the subwatersheds modeled (Illinois River to Tahlequah, Baron Fork near Eldon, and Caney Creek). Within each of these folders are a series of GLEAMS input files - ".par" files:

- "1.1.FUTURE_100YR" – continued poultry waste application
- "1.1.FUTURE_100YR_LanuseChange" – continued poultry waste application and hay (no cattle) (data processing not completed and not discussed in Engel report)
- "1.1.FUTURE_100YR_NOLitter" – poultry waste application cessation
- "1.1.FUTURE_100YR_NOLitter_HRU" - poultry waste application cessation
- "1.2.FUTURE_50YR_GrowthPoultry" – poultry waste application with growth in poultry industry

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- “1.4FUTURE_50YR_NOAPPLICATION” – poultry waste application cessation
- “2.LAST_50YR_CLEANSOIL” – no poultry waste ever applied and background STP
- “2.LAST_50YR_variable Litter”– 1950-1999 poultry waste land application
- “3.FrancisLake” – continued poultry waste application – results to Lake Francis
- “GLEAMS” – supporting input files and data for model calibration

The original data from which all input files were created is still available in the GIS data layers, raw weather files, and Dr. Engel’s Expert Report.

For the LOADEST Model: y\Engel\Materials\il_river_note\loadest\LOADEST\” folder contains some of the LOADEST input files to compute P loads (Total and Soluble) at Tahlequah, Baron Fork near Eldon, and Caney Creek. The data in these files was derived from flow and P concentration data in spreadsheets described in Section 9 of Dr. Engels’s Expert Report. Due to the large number of input files, some of these were overwritten by Dr. Engel during the use of LOADEST. Thus not all input files may be in this folder. The original data is still available in the spreadsheets referenced in Section 9 of Dr. Engel’s Expert Report. Thus, these input files can be created as needed.

The “2input\routing.xls” file contains data for optimizing parameters for the routing equations as set forth in Dr. Engel’s Expert Report on page D-22.

Dr. Wells’ Model:

The input files are included in each model directory. For example, there are calibration run directories that include all input files for that calibration run. There are also model scenario run directories that include all input files for that scenario run. Again, as an example, the 50-year simulation for the “base” scenario includes all input files for that scenario. These are found in the file named “50yr.zip”. For model calibration, the runs are separated into run directories. Therefore, all input files are located within a directory with the title: “Run#”. In the zip file, “Model calibration.zip”, you will find all the input files for the model run. In order to find these input files, sort by file type. For the CE-QUAL_W2 model all input files use the file type “npt”.

The specific file names that are responsive to Request No. 2 are: “1998-07Data(VW).zip”, “1998-2007.zip”, “50yr.zip”, “50yrmoratorium.zip”, “50yrmoratoriumsod=0.1-0046.zip”, “50yrmoratoriumsoddecline0046.zip”, “50yrmatural.zip”, “97-06 Data.zip”, “98-07 Data.zip”, “Model_calibration.zip”, “model-calib-updates.zip”, and “W2 Model-updates.zip”.

Request for Production No. 3: Please produce all output files used in the Models.

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Supplemental Response to Request No. 3:

Dr. Engel's Models:

For the GLEAMS model, the "y:\Engel\Materials\GLEAMS_Final\" folder contains a series of folders for model scenarios (see Supplemental Response to Request No. 2 (above) for list of folders) that are described in the Dr. Engel's Expert Report. Each scenario folder contains a folder for each of the subwatersheds modeled (Illinois River to Tahlequah, Baron Fork near Eldon, and Caney Creek). Within each of these folders are a series of GLEAMS output files (".out" files).

For the LOADEST model, the "y:\Engel\Materials\il_river_note\loadest\LOADEST\" folder contains the LOADEST output files with P loads (Total and Soluble) at Tahlequah, Baron Fork near Eldon, and Caney Creek. Due to the number of output files, some of these were overwritten and/or removed once summarized during the use of LOADEST. These files are readily reproduced from the original data referenced in the Supplemental Response to Request No. 9.

Dr. Wells' Model:

All output files were provided in the same directory as the run directory except for files that were further post-processed. For the calibration models these are included in the zip file "Model calibration.zip" in the subdirectory with the associated Run#, such as "Run147". For the scenario simulations, the output files are found in their respective scenario zip file, such as "50yr.zip" for the base case, "50yrmoratorium" for the cessation case with no change in SOD, etc. All of the scenarios are identified in Dr. Wells' Expert Report. In order to find these input files, sort by file type. For the CE_QUAL_W2 model all output files use the file type "opt".

The specific file names that are responsive to Request No. 3 are: "1998-2007.zip", "50yr.zip", "50yrmoratorium.zip", "50yrmoratoriumsod=0.1-0046.zip", "50yrmoratoriumsoddecline0046.zip", "50yrmatural.zip", "97-06 Data.zip", "98-07 Data.zip", "Model_calibration.zip", "model-calib-updates.zip", and "W2 Model-updates.zip".

Request for Production No. 4: Please produce all computer codes used in the Models.

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Supplemental Response to Request No. 4:

Dr. Engel's Models:

For the LOADEST model the source code is provided in the folder
"y:\Engel\Materials\il_river_note\loadest\LOADEST\source\".

For the GLEAMS model the source code is provided in the folder
"z:\Engel\Materials\GLEAMS\Model\SourceCode\". The source code for GLEAMS is provided in each of the scenario subwatershed folders (see Supplemental Response to Request No. 2 (above) for list of folders) modified to allow runs for more years.

Dr. Wells' Model:

The model source code is included in the zip file called "source code.zip" and is also found on the Portland State University website: "<http://www.cee.pdx.edu/w2> for Version 3.6". The model use Fortran90/95/2000 programming language and the IVF10.1 Fortran90 compiler. For post and pre-processing codes, the Fortrn90 compiler used was the CVF6.6c and the IVF10.1 compilers.

All preprocessing computer codes are in the respective directories where the preprocessing take place. For example, in the zip file "Temperature inflows from met data.zip" the computer codes are found that were used in the processing of the meteorological data to obtain the input temperature time series. These codes can be found by sorting on the file type "f90".

All post-processing computer codes are in the respective directories where the post-processing takes place. For example, in the analysis of the base case scenario in the file "Tenkiller-postprocessing50yr.zip" the computer codes are in the subdirectory "50yrgrowth" for the growth scenario, etc. Many of the base codes for post-processing the scenarios are in the "50yr" subdirectory and have the file type "f90".

The specific file names that are responsive to Request No. 4 are: "1998-2007.zip", "50yr.zip", "50yrmoratorium.zip", "50yrmoratoriumsod=0.1-0046.zip", "50yrmoratoriumsoddecline0046.zip", "50yrnatural.zip", "97-06 Data.zip", "98-07 Data.zip", "bathymetry.zip", "Boundry Conditions-Processing(VW).zip", "InLake WQ(VW).zip", "input temp time series 10 yr period.zip", "Met Data-Graphs(VW).zip", "met data.zip", "Model Bathymetry_Setup(VW).zip", "Source code.zip", "Temperature inflows from met data.zip", "Model_calibration.zip", "model-calib-updates.zip", "W2 Model-updates.zip", "WaterLevel_Flow Files(VW).zip" and "wq, flow, water level data.zip".

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Request for Production No. 5: Please produce all pre-processing computer programs, functions and procedures used.

Supplemental Response to Request No. 5:

Dr. Engel's Models:

The weather pre-processing code is located in "y:\Engel\Materials\GLEAMS\Data\WEATHER_PRE\". No other pre-processing computer programs, functions or procedures were used.

Dr. Wells' Model:

All FORTRAN codes were written in Fortran90/95/2000. Also, macros were developed for Tecplot10 with the file type "LAY"; templates for graphing were developed for the program GRAPHER7 with the file type "GFR". In many of the directories there are also spreadsheets using EXCEL2007 with the file type "XLXS". These files are embedded in the directories where the pre-processing zip took place.

The specific file names that are responsive to Request No. 5 are: "1998-07 Data(VW).zip", "bathymetry.zip", "Boundry Conditions-Processing(VW).zip", "InLake WQ(VW).zip", "input temp time series 10 yr period.zip", "Met Data-Graphs(VW).zip", "Met data.zip", "Model-Setup-bathymetry.zip", "Model Bathymetry_Setup(VW).zip", "Temperature inflows from met data.zip", "WaterLevel_Flow Files(VW).zip" "Boundry Conditions-Processing(VW).zip" "WaterLevel_Flow Files(VW).zip" and "wq, flow, water level data.zip".

Request for Production No. 6: Please produce all post-processing computer programs, functions and procedures used.

Supplemental Response to Request No. 6:

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Dr. Engel's Models:

In each GLEAMS scenario and subwatershed folder, there is post-processing code (yearlytp.exe) to compile the GLEAMS model outputs.

Dr. Wells' Model:

All FORTRAN codes used for post-processing are included in the file directories where the model results were post-processed. Hence in the file "model calibration.zip", there is a subdirectory "postprocessing" that includes executables and source codes written in Fortran90/95/2000. Also, included in each directory where post-processing occurred were macros using Tecplot10 with the file type "LAY"; graph templates for using the program GRAPHER7 with the file type "GFR", and EXCEL2007 files with the file type "XLXS".

The specific file names that are responsive to Request No. 6 are: "MODEL Calibration.zip", "Calibration Run Data.zip", "Misc Graphics-Presentations(VW).zip", "Post processing-50-yr(VW).zip", "Post processing-50-yr-runs.zip", "TemperatureModeling(VW).zip", "Tenkiller-postprocessing50yr.zip", and "Updates(VW).zip".

Request for Production No. 7: Please produce all computer programs, functions and procedures used.

Supplemental Response to Request No. 7:

Dr. Engel's Models:

See Supplemental responses to Requests 1, 4, 5, and 6. GLEAMS optimization – code and executables for optimization of GLEAMS parameters can be found in each of the scenario and subwatershed subdirectories is described in the Supplemental Response to Request No. 2. Input parameters were optimized using the automated Shuffled Complex Evolution approach.

Routing equation optimization – code and executables for optimizing parameters for the routing equations is located in "y:\Engels\materials\GLEAMS_Final\Lake\" within subdirectories for each watershed.

The GIS data used are in the "y:\Engel\Materials\GLEAMS\GIS\CoreData\" folder.

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Dr. Wells' Model:

See Supplemental responses to Requests 1, 4, 5, and 6.

Request for Production No. 8: Please produce all primary data used for comparison with the Model's input files.

Supplemental Response to Request No. 8:

Dr. Engel's Models:

The GIS data used are in the "y:\Engel\Materials\GLEAMS\GIS\CoreData\" folder.

The weather data used are in the y:\Engel\Materials\GLEAMS\Data\WEATHER\" folder.

Soil attributes from STATSGO are available in "y:\Engel\Materials\GLEAMS\Statsgo\".

Other model inputs and the underlying data are described in Dr. Engel's Expert Report.

Dr. Wells' Model:

Primary data used to develop the model input files are found at: "1998-07 Data(VW).zip", "bathymetry.zip", "Boundry Conditions-Processing(VW).zip", "InLake WQ(VW).zip", "input temp time series 10 yr period.zip", "Met Data-Graphs(VW).zip", "Met data.zip", "Model Bathymetry_Setup(VW).zip", "Temperature inflows from met data.zip", "Model-Setup-bathymetry.zip", "WaterLevel_Flow Files(VW).zip" and "wq, flow, water level data.zip".

Request for Production No. 9: Please produce all primary data used for comparison with the Model's computations.

Supplemental Response to Request No. 9:

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Dr. Engel's Models:

USGS flow data for the Tahlequah, Baron Fork and Caney Creek locations are provided in spreadsheets in 9data: Baron.xls – 1997-2006 flow data; Caney.xls – 1997-2006 flow data; Tahlequah.xls – 1997-2006 flow data; Tahlequah_50-present.csv – 1950 through early 2008 flow data; Baron_50-present.csv - 1950 through early 2008 flow data.


Phosphorous concentration data from USGS and OWRB are provided in spreadsheets in 9data: Baron.xls – 1997-2006 flow data; Caney.xls – 1997-2006 flow data; Tahlequah.xls – 1997-2006 flow data.

Dr. Wells' Model:

The files which were compared to model results are located in all post-processing subdirectories referenced in Supplemental Response to Request No. 6. Included in these directories are post-processing programs/macros/templates, model output, and primary field data used in model-data comparisons. Generally, the primary data have the file type "DAT" and "TXT" and are read in by post-processing programs, graphing packages, macros, and templates as described in the Supplemental Response to Request No. 6.

The specific file names that are responsive to Request No. 9 are: "InLake WQ(VW).zip", "Model calibration.zip", "Calibration Run Data.zip", "Post processing-50-yr(VW).zip", "Post processing-50-yr-runs.zip", and "Updates(VW).zip".

I believe these responses provide all the detail needed to identify documents responsive to the Requests, and should be a sufficient guide for an experienced water quality modeler to run the models of Drs. Engel and Wells. As noted above, the modeling files for these experts were not "disaggregated" - they were produced as part of the expert's considered files in the same form as they are found on the expert's computer. Please call if you have any questions.

Sincerely,

David P. Page

David Page

From: Bond, Michael R. [Michael.Bond@KutakRock.com]
Sent: Friday, May 30, 2008 4:14 PM
To: David Page; robert.george@tyson.com; Jay Jorgensen
Cc: Kelly.Burch@oag.ok.gov; lbullock@bullock-blakemore.com; David Riggs; Baker, Fred; Ward, Liza; Bob Nance; Richard Garren; Xidis, Claire; Bob Nance
Subject: RE: Tyson RFP Concerning Modeling Documents

David, per your suggestion on our call on Wednesday I have discussed with our experts what they need with respect to Plaintiffs' Models. First and foremost they need a working copy of each of the Models utilized by your experts. In layman's terms they need the working version of the Models that Plaintiffs' experts actually sat down and used. This is covered under Tyson Foods, Inc. April 17, 2008 Request for Production No. 1.

Additionally the following information must be provided.

- Model code files required to create all model executable files
- Model code compilation files and full documentation of the compilation options/specifications
- Model executables required to run the models for all applications included in the expert reports
- Model input and output files for the model calibrations
- Model input and output files for the model validations
- Model input and output files for all sensitivity and uncertainty analyses conducted
- Model input and output files for all forecast scenarios
- Pre-processors used for all model inputs including: source codes, compilation options, executables, and all databases/spreadsheets required for pre-processing of the model inputs
- Processors used for model calibration and validation data including: source codes, compilation options, executables, databases, and spreadsheets
- Post-processors used for model outputs including: source codes, compilation options, and executables
- Databases/spreadsheets required to conduct post-processing of model output for calibration, validation, uncertainty/sensitivity analysis, and forecast scenarios
- Post-processed files from all model runs including calibration, validation, sensitivity/uncertainty analysis, and forecast scenarios
- Text files, databases and spreadsheets used for evaluating and presenting results from these post-processed files

All of the above information is covered by the April 17, 2008 Requests for Production and must be produced. At this time I have not been provided with all the requested information. Please advise as to when you intend to

6/6/2008

complete this production.

Michael R. Bond
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From: David Page [mailto:dpag@riggsabney.com]
Sent: Thursday, May 29, 2008 8:12 AM
To: Bond, Michael R.; robert.george@tyson.com
Cc: Kelly.Burch@oag.ok.gov; lbullock@bullock-blakemore.com; David Riggs; Baker, Fred; Ward, Liza; Bob Nance; Richard Garren; Xidis, Claire; Bob Nance
Subject: Tyson RFP Concerning Modeling Documents

Pursuant to our call yesterday, I can confirm that all of the "documents" responsive to the above referenced request for production (RFP) concerning the modeling information should be included in the "considered materials" produced with Dr Engel's and Dr Wells' expert reports. In order to hopefully avoid any confusion as to which of the considered documents are responsive to each individual request, next week, I will prepare a supplemental response to these requests that will include a separate production, (that we believe is a duplicate of the items produced in the considered materials) on discs or DVDs that will separately identify and include (by file name on the disc and by RFP number) the requested documents that the State or its experts (Engel and Wells) have that are responsive to each of your RFPs.

Please call if you have any questions.

Thanks, David.

David P. Page
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6/6/2008

Following up on your call

From: Jorgensen, Jay T. [jjorgensen@sidley.com]
Sent: Tuesday, June 17, 2008 12:45 PM
To: Ward, Liza; David Page
Cc: Bond, Michael R.
Subject: RE: Following up on your call

Liza,

I have checked with the other defendants and they agree that the Motion to Compel is well founded. The model-related materials produced by the state do not comply with the plaintiffs' discovery obligations because they are not in a form that is reasonably usable. For that reason, we requested that plaintiffs produce exact copies of the models in the form they are maintained by plaintiffs. We have conferred with plaintiffs on this matter multiple times in an effort to obtain the information that the plaintiffs were required to previously produce. As only one example, during the week of June 2-6 I spoke with David Page on the phone about this several times and asked if plaintiffs would produce the models in the same format they are maintained by the plaintiffs' experts. He refused, stating that such a production is not (in his view) technically feasible because portions of the plaintiffs' models reside on three separate computers.

However, defendants always want to resolve issues without court intervention. It is possible that we will be able to overcome the obstacles created by plaintiffs' production if the plaintiffs provide additional information about your models and the way they are maintained. Would you be willing to answer the following questions? If so, I can commit that defendants will take this information to their experts in an attempt to resolve the uncertainties addressed in the Motion to Compel. If those uncertainties are resolved, we may be able to withdraw the motion:

1. What were the different computers (manufacturer, model number, CPU type and operating system) used by Dr. Wells for the calibration and scenario runs described in his expert report?
2. What were the FORTRAM compiler options used by Dr. Wells to create the executables for these calibration and scenario runs?
3. Was the model executable currently on the Portland State University website: <http://www.cce.pdx.edu/w2> (for Version 3.6) the executable used for these calibration and scenario runs?
4. There are multiple calibration run directories in the modeling documents produced. Which calibration run directory (e.g., Run 200, 201, 202, etc.) corresponds to the calibration results in Dr. Wells' expert report?

Jay

From: Ward, Liza [mailto:lward@motleyrice.com]
Sent: Tuesday, June 17, 2008 12:02 PM
To: Jorgensen, Jay T.
Cc: Bond, Michael R.
Subject: RE: Following up on your call

Jay,

We still haven't heard anything from you regarding Defendants' position on the State's Motion to Strike. Unless I hear from you by 3 p.m. (Eastern), we will assume that the remaining Defendants share Tyson's position that they object to the relief sought by the State's Motion to Strike and will file the same.

Thanks.

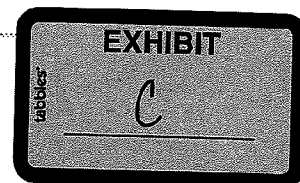
Elizabeth "Liza" C. Ward | Attorney at Law | Motley Rice LLC
 28 Bridgeside Blvd. | Mt. Pleasant, SC 29464 | lward@motleyrice.com
 o. 843 216-9280 | c. 843 834 2514 | f. 843.216.9450

From: Jorgensen, Jay T. [mailto:jjorgensen@sidley.com]
Sent: Monday, June 16, 2008 12:00 PM
To: Ward, Liza
Cc: Bond, Michael R.
Subject: Following up on your call

Liza,

Thanks for speaking with me this morning. To summarize our conversations, you asked whether defendants would be willing to withdraw their motion to compel production of working copies of plaintiffs' models. If not, plaintiffs intend to file a motion to strike. The grounds for the motion are that plaintiffs believe they are still meeting and conferring with defendants on this issue.

I told you I would pass this request on to the other defendants, since the motion was filed on behalf of all of them. I have passed on your



request, and will let you know as soon as I have received a response from each of the defendants.

Jay

Jay T. Jorgensen | Sidley Austin LLP
1501 K St NW, Washington D.C. 20005 | 202.736.8020

Sidley Austin LLP mail server made the following annotations on 06/16/08, 11:00:24:

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Sidley Austin LLP mail server made the following annotations on 06/17/08, 12:44:40:

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Of Counsel
Benjamin P. Abney
E. Bryan Hansen
David P. Page
Peter J. Regan

June 18, 2008

Via Email: jjorgensen@sidley.com

Jay T. Jorgensen, Esq.
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1501 K St. NW
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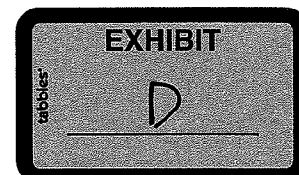
Re: Tyson Request for Production of Documents Concerning
Modeling Documents ("Modeling RFPs")

Dear Jay,

This letter is written in response to your recent email of June 17, 2008 (copy attached). There are several errors in your email that need correction.

First, the model – related materials produced by the State did and do comply with the State's discovery obligations under FRCP 26(a)(2) (expert reports) and 34(b)(2) (responses to request for production). I do not understand what you mean when you say the State did not comply with its "discovery obligations because they are not in a form that is reasonably useable." As I hope I made clear in my letter of June 13, 2008 to Michael Bond, the information that was produced to Defendants as part of Drs. Engel and Wells considered materials: (1) included the "documents" (computer files) that were requested by Tyson in the Tyson RFP; (2) were not "diagggregated" (as you claim in the Motion to Compel) and (3) were produced in the same form as they are maintained and used by Drs. Engel and Wells on their computers.

You are also incorrect in implying that our discussions on these topics were complete (so that your obligation to meet and confer was satisfied) and your claim that I "refused" to produce the models in the same format as they are maintained by Drs. Engel and Wells. My recollection of our discussions is that I told you that we were still preparing a detailed, supplemental response to the Model RFPs that would specifically identify which files produced in the Expert's considered materials responded to each



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particular request for production. I also recall telling you that I did not know whether or not we had produced or could feasibly produce the materials as they exist on each of the Expert's computers. But, I don't recall any "refusal" – only that I was still looking into the issue. As it turned out, and as I explained in my letter of June 13, 2008 (first paragraph) and again here, the State did produce the models in Drs. Engel and Wells considered materials as they were kept on their respective computers. What's more, you also have a detailed explanation of the modeling files that were produced that matches the produced files with the individual requests for production. Obviously your Motion to Compel was premature (and, indeed unwarranted). If you had simply allowed me to complete my work responding to your questions you would have seen that all of the information had been properly produced pursuant to FRCP 26 and 34 as part of the Engel and Wells considered materials and that the State's supplemental Response (June 13, 2008 letter to M. Bond) clearly identified which files responded to each individual request for production.

I believe the State has no obligation under Rules 26 or 34 to answer your new questions about Dr. Wells' expert analysis that you pose in yesterday's email. These questions would typically be posed to Dr. Wells in a deposition. However, in the spirit of continued cooperation I have endeavored to secure answers to these additional questions as follows:

Question No. 1

What were the different computers (manufacturer, model number, CPU type and operating system) used by Dr. Wells for the calibration and scenario runs described in his expert report?

Answer No. 1

Dell laptops, one Core Duo 2.2 GHz and one Core2 Duo 2.4 GHz; one desktop Intel core2 duo e7000; Windows XP Pro.

Question No. 2

What were the FORTRAM (sic) compiler options used by Dr. Wells to create the executables for these calibration and scenario runs?

Answer No. 2

Calibration runs:

```
/nologo/O3/Og/Qparallel/include:"C:\Program files\AnCAD\MATFOR4\include\if9"  
/real_size:64 /module:"Release\" /object:"Release\" /libs:static /threads /winapp /c
```

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```
/OUT:"Release\w2_ivf.exe" /NOLOGO /LIBPATH:"C:\Program
Files\AnCAD\MATFOR4\lib\if9" /MANIFEST /MANIFESTFILE:"C:\scott\research\corps
of engineers\tomcole\w2code\version 36\ivf\win32\w2_code\w2-
intel\WinApp1\release\w2_ivf.exe.intermediate.manifest" /SUBSYSTEM:WINDOWS
/IMPLIB:"C:\scott\research\corps of engineers\tomcole\w2code\version
36\ivf\win32\w2_code\w2-intel\WinApp1\release\w2_ivf.lib" fml.lib fgl.lib spml.lib
```

ALSO only for the following subroutines TEMPERATURE, TRANSPORT,
WQCONSTITUENTS:

```
/nologo /O3 /Og /Qparallel /include:"C:\Program Files\AnCAD\MATFOR4\include\if9"
/real_size:64 /module:"Release\\" /object:"Release\\" /libs:static /threads /winapp /c
/Qopenmp
```

ALSO only for WATER QUALITY:

```
/nologo /Og /Qparallel /include:"C:\Program Files\AnCAD\MATFOR4\include\if9"
/real_size:64 /module:"Release\\" /object:"Release\\" /libs:static /threads /winapp /c
```

Scenario runs:

```
/nologo /O3 /Og /Qparallel /real_size:64 /module:"Release\\" /object:"Release\\"
/libs:static /threads /c
```

```
/OUT:"Release\fhfab.exe" /INCREMENTAL:NO /NOLOGO /MANIFEST
/MANIFESTFILE:"C:\scott\research\corps of engineers\tomcole\w2code\NEW code
enhancements\fish habitat criterion\fhfab\release\fhfab.exe.intermediate.manifest"
/SUBSYSTEM:CONSOLE /IMPLIB:"C:\scott\research\corps of
engineers\tomcole\w2code\NEW code enhancements\fish habitat
criterion\fhfab\release\fhfab.lib"
```

ALSO only for the following subroutines TEMPERATURE, TRANSPORT,
WQCONSTITUENTS:

```
/nologo /O3 /Og /Qparallel /real_size:64 /module:"Release\\" /object:"Release\\"
/libs:static /threads /c /Qopenmp
```

ALSO only for WATER QUALITY:

```
/nologo /Og /Qparallel /real_size:64 /module:"Release\\" /object:"Release\\" /libs:static
/threads /c
```

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Question No. 3

Was the model executable currently on the Portland State University website: <http://www.cee.pdx.edu/w2> (for Version 3.6) the executable used for these calibration and scenario runs?

Answer No. 3

The model executable on the PSU website was used for the calibration runs. The executables for the scenario runs were included in the run directories for the scenario runs produced in the Wells' considered materials. The source code for the scenario runs was included in the file "source code.zip".

Question No. 4

There are multiple calibration run directories in the modeling documents produced. Which calibration run directory (e.g., Run 200, 201, 202, etc.) corresponds to the calibration results in Dr. Wells' expert report?

Answer No. 4

Run143 was the run used in the Wells' Expert Report.

I trust that this letter satisfactorily explains the situation and that you will immediately withdraw the Motion to Compel. I also suggest that we schedule the Engel and Wells depositions so that any other modeling questions may be expeditiously answered.

Very Truly Yours,



David P. Page

DPP/sdk

Enc.

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cc: Michael Bond (via email)

Following up on your call

Page 1 of 2

David Page

From: Jorgensen, Jay T. [jjorgensen@sidley.com]
Sent: Tuesday, June 17, 2008 12:45 PM
To: Ward, Liza; David Page
Cc: Bond, Michael R.
Subject: RE: Following up on your call

Liza,

I have checked with the other defendants and they agree that the Motion to Compel is well founded. The model-related materials produced by the state do not comply with the plaintiffs' discovery obligations because they are not in a form that is reasonably usable. For that reason, we requested that plaintiffs produce exact copies of the models in the form they are maintained by plaintiffs. We have conferred with plaintiffs on this matter multiple times in an effort to obtain the information that the plaintiffs were required to previously produce. As only one example, during the week of June 2-6 I spoke with David Page on the phone about this several times and asked if plaintiffs would produce the models in the same format they are maintained by the plaintiffs' experts. He refused, stating that such a production is not (in his view) technically feasible because portions of the plaintiffs' models reside on three separate computers.

However, defendants always want to resolve issues without court intervention. It is possible that we will be able to overcome the obstacles created by plaintiffs' production if the plaintiffs provide additional information about your models and the way they are maintained. Would you be willing to answer the following questions? If so, I can commit that defendants will take this information to their experts in an attempt to resolve the uncertainties addressed in the Motion to Compel. If those uncertainties are resolved, we may be able to withdraw the motion:

1. What were the different computers (manufacturer, model number, CPU type and operating system) used by Dr. Wells for the calibration and scenario runs described in his expert report?
2. What were the FORTRAM compiler options used by Dr. Wells to create the executables for these calibration and scenario runs?
3. Was the model executable currently on the Portland State University website: <http://www.coe.pdx.edu/w2> (for Version 3.6) the executable used for these calibration and scenario runs?
4. There are multiple calibration run directories in the modeling documents produced. Which calibration run directory (e.g., Run 200, 201, 202, etc.) corresponds to the calibration results in Dr. Wells' expert report?

Jay

From: Ward, Liza [mailto:lward@motleyrice.com]
Sent: Tuesday, June 17, 2008 12:02 PM
To: Jorgensen, Jay T.
Cc: Bond, Michael R.
Subject: RE: Following up on your call

Jay,

We still haven't heard anything from you regarding Defendants' position on the State's Motion to Strike. Unless I hear from you by 3 p.m. (Eastern), we will assume that the remaining Defendants share Tyson's position that they object to the relief sought by the State's Motion to Strike and will file the same.

Thanks.

Elizabeth "Liza" C. Ward | Attorney at Law | Motley Rice LLC
 28 Bridgeside Blvd. | Mt. Pleasant, SC 29464 | lward@motleyrice.com
 o. 843 216-9280 | c. 843 834 2514 | f. 843.216.9450

From: Jorgensen, Jay T. [mailto:jjorgensen@sidley.com]
Sent: Monday, June 16, 2008 12:00 PM
To: Ward, Liza
Cc: Bond, Michael R.
Subject: Following up on your call

Liza,

Thanks for speaking with me this morning. To summarize our conversations, you asked whether defendants would be willing to withdraw their motion to compel production of working copies of plaintiffs' models. If not, plaintiffs intend to file a motion to strike. The grounds for the motion are that plaintiffs believe they are still meeting and conferring with defendants on this issue.

I told you I would pass this request on to the other defendants, since the motion was filed on behalf of all of them. I have passed on your

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Following up on your call

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request, and will let you know as soon as I have received a response from each of the defendants.

Jay

Jay T. Jorgensen | Sidley Austin LLP
1501 K St NW, Washington D.C. 20005 | 202.736.8020

Sidley Austin LLP mail server made the following annotations on 06/16/08, 11:00:24:

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6/18/2008